IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-4028

DONALD C. AUSTIN,

Plaintiff-Appellant,

v.

AMERICAN ASSOCIATION OF
NEUROLOGICAL SURGEONS,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 98 C 7685—**Elaine E. Bucklo**, *Judge*.

ARGUED APRIL 9, 2001—DECIDED JUNE 12, 2001

Before POSNER, EVANS, and WILLIAMS, *Circuit Judges*.

POSNER, *Circuit Judge*. Donald C. Austin, a neurosurgeon, was suspended for six months by the American Association of Neurological Surgeons, a voluntary association incorporated under Illinois law as a not-for-profit corporation, to which he belonged (he has since resigned). He brought this suit against the Association claiming that he had been suspended in "revenge" for having testified as an expert witness for the plaintiff in a medical malpractice suit brought against another member of the Association, a Dr.

Ditmore. Austin argues that the suspension violated Illinois law (federal jurisdiction is based on the parties' being citizens of different states) and seeks damages measured by the decline in his expert-witness income as a consequence of the suspension. He also seeks an injunction expunging the record of the suspension, but he does not seek reinstatement to membership.

Ordinarily a dispute between a voluntary association and one of its members is governed by the law of contracts, the parties' contractual obligations being defined by the charter, bylaws, and any other rules or regulations of the association that are intended to create legally enforceable obligations. See, e.g., *Head v. Lutheran General Hospital*, 516 N.E.2d 921, 927 (Ill. App. 1987); *Perkaus v. Chicago Catholic High School Athletic League*, 488 N.E.2d 623, 627 (Ill. App. 1986); *Dawkins v. Walker*, No. 1991712, 2001 WL 259285, at *5 (Ala. March 16, 2001); *Robinson v. Kansas State High School Activities Ass'n, Inc.*, 917 P.2d 836, 844 (Kan. 1996); 2 Marilyn E. Phelan, *Nonprofit Enterprises: Corporations, Trusts, and Associations* § 14:03, p. 14-12 (2000). Austin does not argue that in suspending him the Association was violating any of its contractual obligations to him. But recognizing that membership in good standing in a professional association may be essential to a professional's livelihood, Illinois like other states has conferred additional legal rights on members of voluntary associations (not limited to professional associations). A member who can show that the association's action of which he complains substantially impaired an "important economic interest" of his can base suit on procedural irregularities (denial of "due process") or bad faith as well as on the usual contractual grounds. *Van Daele v. Vinci*, 282 N.E.2d 728, 731-32 (Ill. 1972); *National Assoc. of Sporting Goods Wholesalers, Inc. v. F.T.L. Marketing Corp.*, 779 F.2d 1281, 1285 (7th Cir. 1985) (applying Illinois law); *Jacobson v. New York Racing Ass'n*, 305 N.E.2d 765, 768 (N.Y.

1973); *Falcone v. Middlesex County Medical Society*, 170 A.2d 791, 796-97 (N.J. 1961); *Freeman v. Sports Car Club of America, Inc.*, 51 F.3d 1358, 1363 (7th Cir. 1995) (applying Indiana law); *NAACP v. Golding*, 679 A.2d 554, 562 (Md. App. 1996); 2 Phelan, *supra*, § 14:03, pp. 14-10 to 14-11. The cases add to the list of grounds for such a suit violation of the association's charter or bylaws and contravention of public policy, but the former ground (violation of charter or bylaws) is just another way of assimilating voluntary-association law to contract law (see, besides the cases cited earlier, *Van Valkenburg v. Liberty Lodge*, 619 N.W.2d 604, 610 (Neb. App. 2000), and *Employees' Benefit Ass'n v. Grissett*, 732 So. 2d 968, 975 (Ala. 1998))—and the latter too, since illegality is a conventional basis in contract law for rescinding a contract, see, e.g., E. Allan Farnsworth, *Contracts* §§ 5.1, 5.8 (3d ed. 1999), including a bylaw or charter provision pursuant to which a member of a voluntary association has been expelled. See, e.g., *Crandall v. North Dakota High School Activities Ass'n*, 261 N.W.2d 921, 925-26 (N.D. 1978). What "bad faith" adds to the litany of grounds is obscure; it can be regarded either as a component of the due process analysis, analogous to the requirement of an impartial tribunal in an ordinary due process case, or as an implied term in the contract between the association and its members.

There were no procedural irregularities here—Austin received notice and a full hearing (with counsel) before a panel of Association members not implicated in his dispute with Ditmore. The complaint is rather that the Association acted in bad faith because it never disciplines members who testify on behalf of malpractice defendants as distinct from malpractice plaintiffs and that it is against public policy for a professional association to discipline a member on the basis of trial testimony unless the testimony was intentionally false.

Austin had been retained to testify on behalf of a woman whose recurrent laryngeal nerve was permanently damaged in the course of an anterior cervical fusion performed by Dr. Ditmore, resulting in a paralyzed vocal cord, difficulty in swallowing, and shortness of breath that ultimately required her to undergo a tracheostomy. An anterior cervical fusion is an operation to repair a herniated spinal disc at the back of the neck. The operation is called "anterior" because the surgeon cuts into the spine from the front, that is, through the neck, being careful to push aside ("retract," in medical lingo) the tissues in front of the spine. According to the testimony that Austin was permitted to give at trial, he believes and "the majority of neurosurgeons" would concur that the plaintiff could not have suffered a permanent injury to her recurrent laryngeal nerve unless Dr. Ditmore had been careless, because she had no anatomical abnormality that might have enabled such an injury to result without negligence on the surgeon's part—though in the disciplinary hearing it emerged that, because the recurrent laryngeal nerve is difficult to see, and often is not seen during the operation, it may be impossible to determine whether the particular patient's nerve is unusually susceptible to injury. Austin testified that Ditmore must have rushed the operation (though there was no other evidence of that) and as a result retracted the tissues adjacent to the recurrent laryngeal nerve too roughly. As Ditmore pointed out at the hearing, however, Austin could hardly be considered an expert on anterior cervical fusion, having performed only 25 to 30 of them in more than 30 years in practice, although he had performed a large number of other cervical operations. Ditmore in contrast had performed 700 anterior cervical fusions—with exactly one case of permanent damage to a patient's recurrent laryngeal nerve, namely the case of the patient who had sued him.

Dr. Austin claimed at the hearing that he had based his opinion on an article by a Dr. Ralph Cloward, described by Austin as the "father" of anterior cervical fusion, which had concluded that "serious complications are avoidable and can be prevented by the surgeon adhering strictly to the surgical technique described for" an anterior cervical fusion; and on another article, which Austin did not date, or identify other than by the last name of the author, Watkins, which states that "the key to prevention of traction injuries to the [recurrent laryngeal] nerve is not to retract vigorously into the soft tissues." Although neither side's lawyer appears to have been aware of the fact, both articles are reprinted in full in the appellate record—in fact twice. The citations are Ralph B. Cloward, "Complications of Anterior Cervical Disc Operation and Their Treatment," 69 *Surgery* 175, 182 (1971); Robert G. Watkins, "Cervical, Thoracic, and Lumbar Complications—Anterior Approach," in *Complications of Spine Surgery* 211, 221 (Steven R. Garfin ed. 1989).

Neither article supports Austin's testimony. Cloward was making a general statement of reassurance about the avoidability of serious complications of his pet operation, not anything specifically to do with the risk of permanent damage to the recurrent laryngeal nerve. Watkins never suggested that all traction injuries to the recurrent laryngeal nerve could be prevented by gentle retraction. Austin admitted that he hadn't discussed the matter with any other medical professionals. Expert evidence contrary to Austin's was given and the jury returned a verdict for Ditmore. That was in 1995. Ditmore promptly complained to the Association and Austin was suspended in 1997 following a hearing at which he and Ditmore testified, the latter to the effect that Austin had no basis for testifying that most neurosurgeons agreed with his view. This suit followed quickly on the heels of the suspension, and the

district court granted summary judgment in favor of the Association.

Oddly, apart from Cloward's article, and the Watkins article of unknown provenance (unknown to the lawyers, that is), no literature on anterior cervical fusion or injuries to the recurrent laryngeal nerve was presented either to the Association's hearing board or to the district court, although some additional literature had been presented at the malpractice trial and there is an abundance of up-to-date relevant literature easily retrievable from the World Wide Web. There we discover in a cursory search that permanent damage to the recurrent laryngeal nerve is a known though fortunately rare complication of anterior cervical fusion (a 1982 study found only 52 cases of paralysis to the recurrent laryngeal nerve in 70,000 such operations—.07 percent) against which the patient should be warned. See, e.g., informeddecision.com, http://www.informeddecision.com/options/cervical/crvfusna.htm; wvneuro.com, http://www.wvneuro.com/anterior_cervical_fusion_page_1_.htm; headpain.com, http://www.headpain.com/p_acf.htm; neurosurgery.org, http://www.neurosurgery.org/health/patient/detail.asp?DisorderID=36. Asked on cross-examination at the malpractice trial to explain why the medical literature did not confirm his view of what a majority of neurosurgeons think, Austin responded lamely that the "medico-legal atmosphere that we're in these days" had deterred the surgical community from acknowledging that this particular complication of anterior cervical fusion could occur only through the surgeon's negligence.

But that is an aside, as we do not understand Austin to be contending that the record is inadequate to support an inference that his testimony was indeed irresponsible. Since neither article on which he relies (for, just as in the disci-

plinary hearing and in the district court, he cites no other literature in this court) states that permanent injury to the recurrent laryngeal nerve of a patient with a normal neck *never* occurs without negligence on the part of the surgeon, and since his position if accepted would, by making the surgeon an insurer against any serious mishaps in an anterior cervical fusion, make the operation exceptionally risky in a financial or liability sense for the surgeon, and since Austin plainly had not attempted to sound the opinion of his profession to determine whether a majority of the nation's several thousand neurosurgeons agree with his unorthodox view, there is little doubt that his testimony was irresponsible and that it violated a number of sensible-seeming provisions of the Association's ethical code. These include provisions requiring that a member appearing as an expert witness should testify "prudently," must "identify as such, personal opinions not generally accepted by other neurosurgeons," and should "provide the court with accurate and documentable opinions on the matters at hand."

The dismissal of Austin's suit was unquestionably correct. To begin with, he failed to show that an "important economic interest," as the Illinois cases interpret the term, is at stake. Membership in the American Association of Neurological Surgeons is not a precondition to the practice of neurosurgery. The AANS is not even the only association of such surgeons, though we were told without contradiction that it is the premier one. Austin continues to practice neurosurgery notwithstanding his suspension and subsequent voluntary resignation from the Association, and he doesn't even seek reinstatement—only damages and expungement of the record of his disciplinary suspension. Indeed, despite the suspension, he continues to testify extensively as an expert witness in medical malpractice cases. True, his income from testifying has fallen to 35 percent of

what it was before the suspension, when it was more than $220,000 a year. Austin's brief describes this drop in income as "disastrous" and "catastrophic," but that is a hyperbolic characterization. Thirty-five percent of $220,000 is a healthy $77,000—and this is merely as it were Dr. Austin's moonlighting income, income from a sideline to his primary profession, which is that of a neurosurgeon, not an expert witness (he does not claim the dubious title of "professional expert witness"). That is not the kind of professional body blow that the cases have in mind when they speak of an "important economic interest" jeopardized by the action of a voluntary association. Compare *Van Daele v. Vinci*, *supra*, 282 N.E.2d at 731-32, where expulsion from an association of independent retail grocers placed the plaintiff grocer at a potentially catastrophic competitive disadvantage by denying him access to the volume discounts that the association obtained from its suppliers. At the very least, the association's action must jeopardize the principal source of the professional's livelihood, and not a mere sideline. Compare *Falcone v. Middlesex County Medical Society*, *supra*, 170 A.2d at 794, where the refusal of a local medical society to admit a duly licensed physician to membership prevented him as a practical matter from practicing as a surgeon and obstetrician by denying him access to local hospitals. Where membership is optional, expulsion (or suspension, or denial of admission) is not deemed the invasion of an important economic interest. *Treister v. American Academy of Orthopaedic Surgeons*, 396 N.E.2d 1225, 1231-32 (Ill. App. 1979); *Finn v. Beverly Country Club*, 683 N.E.2d 1191, 1193 (Ill. App. 1997); *Lee v. Snyder*, 673 N.E.2d 1136, 1139 (Ill. App. 1996).

But there is much more that is wrong with this suit. There is no basis for Austin's claim that the Association entertains only complaints against members who testify on behalf of malpractice plaintiffs. What is true is that to date all complaints (but there have been very few) have been against

such members; but the reason is at once obvious and innocent. If a member of the Association is sued for malpractice and another member gives testimony for the plaintiff that the defendant believes is irresponsible, it is natural for the defendant to complain to the Association; a fellow member has irresponsibly labeled him negligent. If a member of the Association who testifies for a plaintiff happens to believe that the defendant's expert witness was irresponsible, he is much less likely to complain, because that expert (and fellow member of the Association) has not accused *him* of negligence or harmed him in his practice or forced him to stand trial or gotten him into trouble with his liability insurer. The asymmetry that Austin points to as evidence of bad faith is thus no evidence of bad faith at all; and he has no other evidence of bad faith.

In support of his further claim that it is against public policy for a professional association to sanction one of its members for irresponsible (as distinct from knowingly false) testimony, Austin argues that the threat of such sanctions is a deterrent to the giving of expert evidence and so a disservice to, indeed an interference with, the cause of civil justice. We disagree and think the courts of Illinois would likewise; this kind of professional self-regulation rather furthers than impedes the cause of justice. By becoming a member of the prestigious American Association of Neurological Surgeons, a fact he did not neglect to mention in his testimony in the malpractice suit against Ditmore, Austin boosted his credibility as an expert witness. The Association had an interest—the community at large had an interest—in Austin's not being able to use his membership to dazzle judges and juries and deflect the close and skeptical scrutiny that shoddy testimony deserves. It is no answer that judges can be trusted to keep out such testimony. Judges are not experts in any field except law. Much escapes us, especially in a highly technical field, such as

neurosurgery. When a member of a prestigious professional association makes representations not on their face absurd, such as that a majority of neurosurgeons believe that a particular type of mishap is invariably the result of surgical negligence, the judge may have no basis for questioning the belief, even if the defendant's expert testifies to the contrary.

The *Daubert* rule, it is true, requires judges to screen proposed expert witnesses carefully to make sure that their testimony will be responsible, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318-19 (7th Cir. 1996); *Wilson v. City of Chicago*, 6 F.3d 1233, 1238-39 (7th Cir. 1993), but only federal courts are bound by the rule (though this is not a limitation particularly relevant here, since the malpractice suit that Austin testified in was tried in a federal district court); and it is not airtight. (See *Ambrosini v. Labarraque*, 101 F.3d 129, 133-34 (D.C. Cir. 1996), discussing the limited nature of the judge's gatekeeping role under *Daubert*.) Judges need the help of professional associations in screening experts. The American Association of Neurological Surgeons knows a great deal more about anterior cervical fusion than any judge, and if the Association finds in a proceeding that comports with the basic requirements of due process of law that a member of the Association gave irresponsible expert testimony, that is a datum that judges, jurors, and lawyers are entitled to weigh heavily. One has only to read the transcript of the disciplinary hearing, and particularly the questions that the members of the hearing panel, all neurosurgeons of course, directed to Dr. Austin, to realize how far the ordinary voir dire of an expert can fall short. The market response to Austin's suspension has not been irrational.

We doubt that he would embrace the converse of the rule for which he contends, and concede that if a judge rules

that a proposed expert's testimony is inadmissible because irresponsible, that ruling is a proper predicate for professional discipline. Fair enough; a judge is not a surgical expert and his ruling on the admissibility of an expert's witness may be in error. But by the same token the judge's ruling that expert testimony is admissible should not be taken as conclusive evidence that it is responsible testimony.

There is a great deal of skepticism about expert evidence. It is well known that expert witnesses are often paid very handsome fees, and common sense suggests that a financial stake can influence an expert's testimony, especially when it is technical and esoteric and hence difficult to refute in terms intelligible to judges and jurors. More policing of expert witnessing is required, not less. Not that professional self-regulation is wholly trustworthy. Professional associations have their own axes to grind. No doubt most members of the AANS are hostile to malpractice litigation, and this may impart a subtle bias to its evaluation of members' complaints, though there is nothing in the transcript of the hearing before the Association's hearing panel to justify such an inference. But even in cases such as this, where the absence of an "important economic interest" deprives the disciplined member of the special protections of Illinois voluntary-association law, he has recourse to defamation law should the discipline falsely impugn his professional competence, see, e.g., *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1015 (3d Cir. 1994); *Fitzgerald v. Minnesota Chiropractic Ass'n, Inc.*, 294 N.W.2d 269 (Minn. 1980), including his competence to testify responsibly on issues within the scope of his professional expertise. If Austin was wronged by the Association, he had remedies, but not under the Illinois law of voluntary associations.

We note finally that there is a strong national interest, which we doubt not that Illinois would embrace, in identi-

fying and sanctioning poor-quality physicians and thereby improving the quality of health care. Although Dr. Austin did not treat the malpractice plaintiff for whom he testified, his testimony at her trial was a type of medical service and if the quality of his testimony reflected the quality of his medical judgment, he is probably a poor physician. His discipline by the Association therefore served an important public policy exemplified by the federal Health Care Quality Improvement Act, 42 U.S.C. §§ 11101 *et seq.*, which encourages hospitals to conduct professional review of its staff members and report malpractice to a federal database. As an inducement to the vigorous performance of this reporting function, the Act immunizes hospitals from liability for disciplinary actions they take against staff physicians, provided only that the hospital is acting in good faith. See 42 U.S.C. §§ 11101, 11111, 11112; *Brader v. Allegheny General Hospital*, 167 F.3d 832, 839-41 (3d Cir. 1999); *Wayne v. Genesis Medical Center*, 140 F.3d 1145, 1148 (8th Cir. 1998) (per curiam); *Imperial v. Suburban Hospital Ass'n, Inc.*, 37 F.3d 1026, 1028 (4th Cir. 1994).

As a final detail, irrelevant on the view we take of this case but possibly relevant to future cases, we note the merited difficulty of proof of damages in a case such as this. Austin cannot obtain damages for any injury to his professional reputation and resulting fee-earning opportunities as a result of the *accurate* revelation of his having given irresponsible testimony under oath in a suit for medical malpractice. That injury is the direct consequence of socially valuable information; that it might have been precipitated by an unlawful act (though we think not) would not make the act a "cause" of the injury in a sense that the law recognizes. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), establishes the principle in the antitrust context, but it is equally apropos the common law tort context. A competitor of a merged firm claimed to be injured

because the merger, though unlawful, had intensified lawful competition with it. The Court held that the injury this firm had sustained was not the kind of injury that antitrust law tries to prevent—on the contrary, lawful competition is an "injury" (to competitors hurt by competition) that the antitrust laws seek to promote. To put this differently, the merger had both good and bad effects, and the good effects should not be punished by an award of damages. It is the same here. Tort law does not seek to prevent injuries arising from the dissemination of truthful information that rationally induces withdrawal of patronage from the person whom the information concerns. So Austin, had he proved a wrong, would have had to partition the injury resulting from it between the part due to the revelation of truthful information and the part due to the disciplinary suspension itself. Compare the many cases which hold that the victim of defamation can obtain damages only for any *incremental* harm done to his reputation by the defamation—if his reputation has already been destroyed by truthful information, he has no remedy. E.g., *McIlvain v. Jacobs*, 794 S.W.2d 14, 15-16 (Tex. 1990); *Desnick v. American Broadcasting Cos.*, 44 F.3d 1345, 1350 (7th Cir. 1995); *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1228 (7th Cir. 1993); *Re v. Gannett Co.*, 480 A.2d 662, 669 (Del. Super. 1984), affirmed, 496 A.2d 553 (Del. 1985).

AFFIRMED.

WILLIAMS, *Circuit Judge*, concurring in part and in the judgment. I join the majority opinion only insofar as it holds that Dr. Austin has not demonstrated an "important economic interest" in membership in the American Association of Neurological Surgeons. Without an important eco-

nomic interest, Dr. Austin may not challenge in the courts the Association's private, internal procedure under Illinois law. *Van Daele v. Vinci*, 282 N.E.2d 728, 731 (Ill. 1972). As that holding is dispositive of this case, in my view we need not proceed to predict whether Illinois would find the Association's procedure a violation of public policy. *Cf. Disher v. Info. Res., Inc.*, 873 F.2d 136, 141 (7th Cir. 1989) ("We are reluctant to opine unnecessarily on questions of state law."); *Graphic Sales, Inc. v. Sperry Univac Div., Sperry Corp.*, 824 F.2d 576, 581 (7th Cir. 1987) ("As a federal court whose jurisdiction is based on diversity of citizenship, we are particularly hesitant to decide unsettled questions of state law unnecessarily.").

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Clerk of the United States Court of Appeals for the Seventh Circuit

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(Cite as: 120 F.Supp.2d 1151)

United States District Court,
N.D. Illinois,
Eastern Division.

Dr. Donald C. AUSTIN, Plaintiff,
v.
AMERICAN ASSOCIATION OF NEUROLOGICAL SURGEONS (founded in 1931 as the Harvey Cushing Society), Defendant.

No. 98 C 7685.

Oct. 20, 2000.

MEMORANDUM OPINION AND ORDER

BUCKLO, District Judge.

From 1963 to 1996, Dr. Donald C. Austin, a citizen of Michigan, was a member of the American Association of Neurological Surgeons (the "AANS"), a professional association incorporated under Illinois law and with its principal place of business in this state. In 1996, the AANS suspended Dr. Austin for violating its Code of Ethics and Expert Witness Guidelines. When charged in 1995, he submitted a letter of resignation. However, rather than accepting the resignation at that time, the AANS decided to proceed with disciplinary charges that Dr. Austin provided "entirely false" testimony in a medical malpractice lawsuit against another physician, Dr. Michael Ditmore. Dr. Austin was represented by counsel throughout the proceedings, which resulted, in 1996, in

a six-month suspension from membership in the AANS. In 1997, Dr. Austin appealed twice and lost. The Board then accepted his resignation. He never applied for re-admission.

In 1998, Dr. Austin filed this diversity lawsuit, to be decided under Illinois law, alleging that the AANS had violated his due process rights secured to him by state law, essentially because he acted in favor of medical malpractice plaintiffs and refused to circle the wagons and justify professional incompetence by other doctors. He alleged that the AANS's unjustified and unfair actions had cost him a lot of money in expert witness fees, because the disciplinary charges made him less attractive as an expert witness. Who, after all, wants an expert who has to acknowledge that he was suspended from his professional association for ethical violations he was found to have committed as an expert witness? The AANS now moves for summary judgment, and I grant the motion.

I.

[1] As a court sitting in diversity, I "attempt to predict how the [Illinois] Supreme Court would decide the issues presented here." *Lexington Ins. Co. v. Rugg & Knopp*, 165 F.3d 1087, 1090 (7th Cir.1999). In Illinois, voluntary associations have great discretion in conducting their internal affairs, and their conduct is "subject to judicial review only when they fail to exercise power consistently with their own internal rules or when their conduct violates the fundamental right of a member to a fair hearing." *Finn v. Beverly Country Club*, 289 Ill.App.3d 565, 225 Ill.Dec. 528, 683 N.E.2d 1191, 1193 (1997). If there has been no "mistake, fraud, collusion or arbitrari-

ness," *id.*, the Illinois Supreme Court has endorsed judicial interference only when a substantial property, contract, or other economic right that implicates due process is at stake. *See Van Daele v. Vinci*, 51 Ill.2d 389, 282 N.E.2d 728 (1972). As that court stated, "[a]lthough the courts in this State have traditionally been reluctant to interfere in the internal operations of associations, [a] strong possibility that an important economic interest of the plaintiffs was affected by an improper administrative proceeding gives the court power and the duty to act." *Id.* at 731. Illinois courts will only review the decisions of private associations when *1153 "the plaintiffs possess[ ] an important economic interest based on the individual's opportunity for . . . pursuing their livelihood which was affected by improper administrative procedures." *Knapp v. Northwestern Univ.*, No. 95 C 6454, 1996 WL 495559, at *1 (N.D.Ill. Aug. 28, 1996) (unpublished opinion of Zagel, J.) (*citing Van Daele*, 282 N.E.2d at 731; *Virgin v. Amer. Coll. of Surgeons*, 42 Ill.App.2d 352, 192 N.E.2d 414, 422-23 (1963); *Duby v. Amer. Coll. of Surgeons*, 468 F.2d 364, 368-69 (7th Cir.1972)). In these cases, Judge Zagel explained:

> [T]he plaintiffs suffered direct and real economic harm to their ability to earn a living as a result of their expulsion from the professional associations. As a result, the courts held they would annul an expulsion from a voluntary association when the expulsion is not in accordance with the constitution and bylaws of the association, is influenced by bias, prejudice or lacking in good faith, or contrary to rudimentary due process or natural justice.

Id. The key points, then, are that under Illinois law, a court may review the internal procedures of a voluntary association with respect to its members only when: (1)

the operation of the association significantly harms an important economic interest of the plaintiff belonging to the association when it acted; (2) the association (a) failed to act in accord with its own constitution and by-laws; (b) was influenced by bias, prejudice, or lacking in good faith, or (c) violated due process. This power exists, furthermore (3), only when the association has "a [public] purpose which exceeds merely that of a social organization and its endeavor to benefit from various State and Federal laws." *Van Daele*, 282 N.E.2d at 732.

II.

A.

The AANS does not dispute that it has a public purpose exceeding that of a mere social organization, and Dr. Austin does not argue that the association failed to follow its own rules, but rather challenges the fairness and application of those rules to his case. Dr. Austin has brought forward sufficient evidence that the Association's actions have significantly affected his economic interests by causing him to lose many hundreds of thousands of dollars in expert witness fees. The AANS contends that Dr. Austin has not established that membership in the association is an "economic necessity," but in Illinois, the standard is whether the association's actions significantly affected "an important economic interest." *Van Daele*, 282 N.E.2d at 731. To recover under Illinois law a member of a private association need not show that he will be rendered homeless or even driven to bankruptcy by its unfair action that caused him significant economic harm.

B.

[2] The question then comes down to whether the AANS deprived Dr. Austin of due process or treated him with bad faith in subjecting him to discipline. In Illinois, "[t]he term 'due process of law' is an ever-maturing concept that evolves from our history and precedent and is not amenable to precise definition." *People v. Washington*, 171 Ill.2d 475, 216 Ill.Dec. 773, 665 N.E.2d 1330, 1338 (1996). However, in the context of the fairness of proceedings, "[t]he essence of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Petersen v. Chicago Plan Commission*, 302 Ill.App.3d 461, 236 Ill.Dec. 305, 707 N.E.2d 150, 154 (1998). The Illinois Supreme Court has acknowledged that a voluntary association need not strictly adhere to "judicial standards of due process," *Van Daele*, 282 N.E.2d at 732, but must provide "one subjected to such disciplinary actions . . . a hearing before a fair and impartial tribunal." *Id.* Due process is "satisfied by a form of procedure that is suitable and proper to the nature of the determination to be made and conforms to fundamental principles of justice." *1154 *Petersen*, 236 Ill.Dec. 305, 707 N.E.2d at 154 (administrative context).

[3] The AANS proceedings in Dr. Austin's case more than met these standards. He does not dispute that he received written notice of the charges, with prior disclosure of all documents considered in the case, or that he was allowed to present his arguments before an AANS Committee and to cross-examine witnesses, or that he received two levels of appeal and was allowed to have representation by counsel at all stages of the proceedings. Unless the whole thing was a sham conducted in bad faith, a kangaroo court run with the cynical purpose

of harming him while pretending to be fair, Dr. Austin received as much due process as anyone might hope for.

C.

[4] Dr. Austin does not actually argue directly that the AANS acted in bad faith, just that it was wrong. However, on a summary judgment motion I must "construe the evidence in the light most favorable to the nonmoving party and draw all justifiable inferences in favor of that party." *Target Market Publishing, Inc. v. ADVO, Inc.*, 136 F.3d 1139, 1141 (7th Cir.1998). Now a tribunal is entitled to make a factually wrong decision, but if the AANS's decisions were so utterly wrong and completely unsupported that no fair and rational person viewing the evidence could have come to that conclusion, that might raise a supportable inference that the AANS acted in bad faith. Nothing in Illinois law suggests that a court may review the factual determinations of a disciplinary committee of a private association, as opposed to the fundamental fairness of its proceedings, but if the factual baselessness of the determination was so great as to raise doubts about fundamental fairness of the process that produced it, then I may review that process under the line of cases I am considering here.

[5] Unfortunately for Dr. Austin, his argument does not show that the AANS's determinations were so devoid of support that a rational jury might conclude it acted in bad faith. The issue was whether he had been justified in testifying that Dr. Ditmore had committed medical malpractice in performing a sort of neck surgery called an "anterior cervical fusion" when a patient of his (the plaintiff in that malpractice case) suffered permanent, total loss of function of the recurrent laryngeal nerve,

which controls the vocal cords. The AANS held that Dr. Austin's testimony in that case "had no convincing basis in either literature or logic." Dr. Austin cites two bases in the literature: (1) a 1971 article in the journal *Surgery*, by a Dr. Ralph B. Cloward, whom Dr. Austin describes as "the father" of the "anterior approach," stating that "serious complications are avoidable"; and (2) an otherwise unidentified piece by a Robert G. Watkins, on complications involved in the anterior approach, stating that "damage [to the recurrent laryngeal nerve] . . . is usually from vigorous retraction. . . . The key to the prevention of traction injuries to the nerve is not to retract vigorously. . . ." Dr. Austin further notes that Dr. Ditmore's defense expert in his malpractice trial testified that he disagreed with Dr. Austin because he thought the literature was wrong.

Even under the plaintiff-friendly summary judgment standard, this is not sufficient evidence to warrant a claim that the AANS's conclusion was so utterly wrong that only bad faith could explain it. Taking the evidence in the light most favorable to Dr. Austin, I must conclude that the AANS was indeed wrong, not merely that there was some basis in the literature for his testimony at Dr. Ditmore's trial. But even if the AANS was wrong, the evidence Dr. Austin provides does not show that it had to be crazy or lying to so conclude, and that is what would be required to give rise to an inference of bad faith. After all, even if serious injuries are "usually" avoidable on the anterior approach by avoiding vigorous retraction, that does not mean that an expert analyst must find to be *1155 convincing some testimony and evidence that only negligence could explain an injury of this sort in a particular case, that negligence was the only possible explanation in that particular case. Rea-

sonable experts could differ, and, without other evidence that the AANS proceedings were a sham, that means that Dr. Austin has not come forward with enough evidence of bad faith to persuade a rational jury.

D.

[6] Dr. Austin creatively argues that I should find for him because the AANS rules under which he was disciplined violate "public policy" by discouraging physicians from testifying for plaintiffs in medical malpractice cases. The public policy in question is that witnesses should not be intimidated from offering testimony they believe to be truthful. But there is no Illinois law giving a court power over the disciplinary decisions of a private association merely because they violate such a public policy. He cites a case in which the Northern District of Illinois enjoined an individual medical malpractice defendant from filing charges against a plaintiff's expert with the county Medical Association, *Konrad v. DeLong*, 57 F.R.D. 123 (N.D.Ill.1972), but that action did not involve a court's interfering with the internal affairs of a private association. In a nice bit of research, Dr. Austin locates a California state decision where a court reversed a doctor's expulsion from his medical association based on its finding that his testimony in court violated its ethics code. *Bernstein v. Alameda-Contra Costa Med. Ass'n*, 139 Cal.App.2d 241, 293 P.2d 862 (1956). That is an old case, however, and this is Illinois. In this state, the only bases for a court's power to interfere in the internal operations of a private association are violation of internal association rules, deprivation of due process, or bad faith. As far as Dr. Austin has shown, these are lacking, and so he loses as a matter of law.

III.

I GRANT the AANS's summary judgment motion, terminating this case. All other pending motions in this case are DENIED as moot.

47 F.Supp.2d 941
(Cite as: 47 F.Supp.2d 941)

United States District Court,
N.D. Illinois,
Eastern Division.

Dr. Donald C. AUSTIN, Plaintiff,
v.
THE AMERICAN ASSOCIATION OF NEUROLOGICAL SURGEONS, (founded in 1931 as The Harvey Cushing Society), Defendant.

No. 98 C 7685.

April 22, 1999.

MEMORANDUM OPINION AND ORDER

BUCKLO, District Judge.

The plaintiff, Dr. Donald C. Austin, brought this lawsuit against the defendant, The American Association of Neurological Surgeons [the "AANS"], alleging that the decision of the AANS to suspend his membership was influenced by bias and prejudice, and was not made in good faith. The AANS moves to dismiss for failure to state a claim. For the following reasons, the motion is denied.

Background[1]

Dr. Austin is a licensed neurological surgeon and a citizen of Michigan. The AANS is an Illinois not-for-profit corporation, with its principle place of business in Illinois. From 1963 through at least *942 March, 1995, Dr. Austin was a member in good standing of the AANS, a trade group of neurological surgeons. In 1993, Dr. Austin testified as an expert witness for the plaintiff against Dr. Q. Michael Ditmore, a neurological surgeon and member of the AANS, in a malpractice suit. Dr. Ditmore claimed that Dr. Austin's testimony violated the code of ethics of the AANS, and a hearing was held by the Professional Conduct Committee of the AANS [the "Committee"]. Dr. Austin presented evidence in support of his testimony, but the Committee recommended that he be suspended for six months. The recommendation was adopted by the Board of Directors of the AANS.

Dr. Austin alleges that the Committee's decision to suspend him was intended to punish him for testifying against Dr. Ditmore in the malpractice suit. According to Dr. Austin, the decision was influenced by bias and prejudice, and was not made in good faith. A substantial part of Dr. Austin's income is derived from testifying as a medical expert, and membership in good standing in the AANS is necessary for such testimony. Dr. Austin requests damages and an injunction directing the AANS to remove from its records any mention of disciplinary action taken against him. The AANS moves to dismiss the complaint for failure to state a claim.

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[1] The background facts are taken from the complaint. When evaluating a motion to dismiss, I must take all well-pleaded factual allegations as true. *Prince v. Rescorp Realty*, 940 F.2d 1104, 1106 (7th Cir.1991).

Motion to Dismiss

[1][2][3] Absent a showing of economic necessity, Illinois courts generally will not review a private association's actions regarding its members. *National Ass'n of Sporting Goods Wholesalers, Inc. v. F.T.L. Marketing Corp.*, 779 F.2d 1281, 1285 (7th Cir.1985). The AANS argues that Dr. Austin has not shown that membership in the AANS is an economic necessity. Dr. Austin alleges in the complaint that he "derives a substantial part of his income from testifying as a medical expert," and that "[m]embership in good standing in the [AANS] is a necessary credential for such testimony." (Compl. § 12). The AANS claims that the suspension has not affected Dr. Austin's ability to practice medicine, and that networking opportunities and other such perks do not constitute economic necessity. Dr. Austin, however, has alleged that membership in good standing in the AANS is necessary for employment as a medical expert in his field. Economic necessity exists where "the association has an economic 'stranglehold' on the relevant market." *F.T.L.*, 779 F.2d at 1285. In addition, the Illinois Supreme Court has stated that a "strong possibility that an important economic interest of the plaintiffs was affected by an improper administrative proceeding gives the court power and the duty to act." *Van Daele v. Vinci*, 51 Ill.2d 389, 394, 282 N.E.2d 728, 731 (1972). Therefore Dr. Austin has alleged economic necessity sufficiently to survive a motion to dismiss.

[4][5] The AANS further argues that a court cannot review the substance of internal decisions by private associations. Courts can, however, intervene if the association did not afford its member due process, or if the association has violated its own bylaws. *F.T.L.*, 779 F.2d at 1285. Dr. Austin has alleged that the AANS has a

code of ethics, that a hearing was held to determine whether he violated that code, and that the decision to suspend his membership was made not in good faith but was the result of bias and prejudice. Whether the AANS complied with its internal rules in this process is not a question that can be determined on a motion to dismiss.

Conclusion

For the reasons discussed above, the motion to dismiss is denied.